91-164

No.

In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA, PETITIONER

v.

THOMPSON/CENTER ARMS COMPANY,
A Division of the K.W. THOMPSON
TOOL COMPANY, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTION PRESENTED

Respondent manufactures pistols and "conversion kits" that allow the pistols readily to be converted into rifles with 10-inch barrels. Under the National Firearms Act, a manufacturer who "makes" a rifle with a barrel shorter than 16 inches (a short-barrel rifle) must register the firearm in the National Firearms Registry and pay a tax of $200. 26 U.S.C. 5841, 5845(a)(3).

The question presented in this case is whether respondent "makes" a short-barrel rifle by distributing the pistol together with the conversion kit and is therefore required to register the firearm and pay the tax due under the National Firearms Act.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and regulations:

In the Supreme Court of the United States

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The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-17a) is reported at 924 F. 2d 1041. The petition for rehearing and suggestion of rehearing en banc were denied without opinion (App., *infra*, 33a, 34a). The opinion of the Claims Court (App., *infra*, 18a-32a) is reported at 19 Cl. Ct. 725.

JURISDICTION

The judgment of the court of appeals was entered on January 30, 1991. The order denying the petition for rehearing was entered on March 29, 1991 (App., *infra*, 33a). The Chief Justice extended the time for filing a petition for a writ of certiorari to and including July 27, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The relevant portions of Sections 5821, 5841, 5845 and 5861 of the National Firearms Act, as amended, 26 U.S.C. 5821, 5841, 5845, 5861, are set forth in the Appendix, *infra*, 35a-37a.

STATEMENT

1. The Thompson/Center Arms Company (Thompson) manufactures a pistol (the "Contender" model) with a receiver that is designed, as a commercially attractive feature, to accept interchangeable barrels of differing lengths and calibers. Thompson also manufactures a "conversion kit" that includes a long barrel and a rifle stock that may be attached to the Contender pistol receiver to convert it into a rifle (App., *infra*, 2a). If the shorter, pistol-length barrel is not removed from the receiver when the rifle stock is added, however, the resulting combination is a "short-barrel rifle" that falls within the definition of a "firearm" under Section 5845(a)(3) of the National Firearms Act, 26 U.S.C. 5845(a)(3).[1] The

[1] The Contender pistol has a 10-inch barrel (App., *infra*, 2a). A "rifle" results when the stock is added to the pistol receiver, for the weapon in that form is designed "to be fired from the shoulder" (26 U.S.C. 5845(c)). A "rifle"

maker of a "firearm," as so defined, is required to pay a tax of $200 for each weapon and register it in the National Firearms Registry. 26 U.S.C. 5821, 5842(b). Moreover, it is a crime punishable by a fine of up to $10,000, or imprisonment for up to ten years, or both, for a person "to receive or possess" a "firearm" if it "is not registered to him" (26 U.S.C. 5861(d)).

The conversion kit manufactured by Thompson is quick and easy to use.[2] By employing "simple, readily available tools," "a short barrel rifle could be assembled in less than five minutes—even more easily and readily than a long barrel rifle—since the barrels would not have to be changed" (App., *infra*, 29a).

In 1985, Thompson was advised by the Bureau of Alcohol, Tobacco and Firearms ("BATF") that, when the conversion kit was possessed or distributed with the Contender pistol, the unit constituted a firearm subject to the Act (App., *infra*, 3a).[3] In response to this advice, Thompson submitted an Application to Make and Register a Firearm and paid the applicable $200 tax for the making of a single such firearm (App., *infra*, 21a). The application sought permission "to make, use, and segregate as a single

with a barrel less than 16 inches long (commonly referred to as a "short barrel rifle") is a "firearm" subject to the registration and tax requirements of the National Firearms Act. 26 U.S.C. 5845(a)(3).

[2] Indeed, the process is so simple that, in a demonstration conducted in open court, counsel for respondent was able to alter the pistol into a short-barrel rifle in a matter of a few minutes (App., *infra*, 29a).

[3] BATF also informed Thompson, however, that the separate marketing of a *complete* pistol and a *complete* carbine would not by itself fall within the scope of the Act (App., *infra*, 3a).

unit" a package consisting of a serially numbered pistol together with a shoulder stock and a 21-inch barrel.[4] BATF approved the application. Thompson then filed a tax refund claim, asserting that the unit it had registered was not a "firearm" because the component parts of the Contender pistol and conversion kit had not been assembled by Thompson as a short-barrel rifle (*id.* at 22a).

2. When the refund application was not approved, Thompson commenced this action in the Claims Court. The court held that the Contender pistol, when possessed together with the conversion kit, constituted a short-barrel rifle and was therefore a "firearm" under the Act (App., *infra*, 18a-32a). The court specifically rejected Thompson's argument that the component parts of the pistol and kit must first be assembled as a short-barrel rifle before they could be deemed to be a firearm (*id.* at 29a-30a). The court concluded that both the language of Section 5845 and its legislative history, together with the relevant case law and "ordinary common sense," lead "inexorably to [the] conclusion that the Contender pistol in conjunction with the [conversion kit] is a firearm under the National Firearms Act" (App., *infra*, 31a). The court therefore granted summary judgment to the government (*id.* at 32a).

[4] Under the National Firearms Act, a manufacturer must first make application and receive permission from the Treasury Department to make a firearm subject to the requirements of the Act. 26 U.S.C. 5822. Thompson elected not to seek qualification as a firearms manufacturer under 26 U.S.C. 5801(a)(1) (which requires payment of an occupational tax of $1000) and instead sought permission to make firearms as a non-qualified manufacturer under 26 U.S.C. 5821(a) (which requires payment of a $200 tax for each firearm made).

3. The court of appeals reversed. The court concluded that a short-barrel rifle "actually must be assembled" (App., *infra*, 4a-5a) in order to be "made" within the meaning of the statute (*id.* at 6a). The court based its conclusion on the statutory description of a short-barrel rifle as one "having" a barrel less than 16 inches in length (26 U.S.C. 5845(c)) and stated that such a "firearm must exist in fact, not in contemplation, to be 'made' within the meaning of the statute" (App., *infra*, 5a). The court noted that other provisions of the Act require the registration of any "combinations of parts" used to convert an unregulated weapon into a machine gun or other "destructive device" (26 U.S.C. 5845(b) and (f)), but the statute does not require registration of a "combination of parts" for use in converting a weapon into a short-barrel rifle (App., *infra*, 7a-8a). The court of appeals acknowledged that, in *United States* v. *Drasen*, 845 F.2d 731, cert. denied, 488 U.S. 909 (1988), the Seventh Circuit had "held that complete but unassembled short-barrel rifle parts kits were 'rifles' within the meaning of Section 5845(c)" (App., *infra*, 17a). The court concluded, however, that, to the extent "that *Drasen* is inconsistent with our conclusion here, we decline to follow it" (*ibid.*).

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals drastically erodes the civil and criminal prohibitions of the National Firearms Act by allowing clearly regulated weapons to escape registration by the simple artifice of maintaining the weapon in partially unassembled form. In holding that the pistol and conversion kit do not constitute a "firearm" under Section 5845

(a)(3) of the National Firearms Act unless they have been actually assembled by a purchaser in the form of a short-barrel rifle, the decision conflicts with the holding of the Seventh Circuit in *United States* v. *Drasen*, 845 F.2d at 736-737, that complete, but unassembled, rifle kits constitute firearms within the meaning of the Act. Since the issue presented in this case has exceptional administrative importance, and since the courts of appeals have reached conflicting interpretations of the statute, review by this Court is warranted.

1. The court of appeals' holding in this case necessarily extends beyond the factual context of single-shot firearms such as the Contender. That is because the National Firearms Act does not draw distinctions based on repeater capability, magazine capacity, caliber or criminal appeal in imposing its registration and tax requirements. While the ultimate function of the Act is to reduce the accessibility of weapons used "by criminals or gangsters" (H.R. Rep. No. 1337, 83d Cong., 2d Sess. A395 (1954)), it necessarily does so through broadly inclusive classifications.

In particular, Section 5845(a)(3) of the Act includes within the definition of a regulated "firearm" *any* "rifle having a barrel or barrels of less than 16 inches in length." 26 U.S.C. 5845(a)(3). A "rifle," in turn, is defined broadly in Section 5845(c) as:

> a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed cartridge to fire only a single projectile through a rifled bore for each single pull of the trigger, and shall include any such weapon which may be readily restored to fire a fixed cartridge.

26 U.S.C. 5845(c). The Act requires any person who makes such a weapon to register it, and the term "make" is, in turn, broadly defined in Section 5845(i) to "include":

> manufacturing * * * putting together, altering, any combination of these, or otherwise producing a firearm.

26 U.S.C. 5845(i). As this Court has observed, in order to accomplish the comprehensive objectives of the statute, "the acts of making and transferring firearms are broadly defined" under the National Firearms Act. *Haynes* v. *United States*, 390 U.S. 85, 88 (1968).

When all of the parts necessary to assemble a rifle are produced and held in conjunction with one another, a "rifle" is the result. A unit that includes a receiver, a 10-inch barrel, and a shoulder stock, is literally a weapon "designed * * * and intended to be fired from the shoulder" with "a barrel or barrels of less than 16 inches in length." 26 U.S.C. 5845(a)(3) and (c). The fact that it may be possessed and sold in a partially unassembled state does not render it any less a "firearm" within the contemplation of the Act. See *United States* v. *Drasen*, 845 F.2d at 737.

By concluding that a firearm is not "made" until it is fully assembled (App., *infra*, 4a), the court of appeals failed to follow the plain language and evident meaning of the statute. As the Seventh Circuit concluded in *United States* v. *Drasen*, *supra*, by placing the registration and tax requirements on persons "manufacturing * * * or otherwise producing a firearm" (26 U.S.C. 5845(i)), the statute applies quite directly to manufacturers who distribute "a complete parts kit ready to be assembled." 845 F.2d at 737. See also *United States* v. *Woods*, 560 F.2d

660, 665 (5th Cir. 1977) (the statute "does not specify that the parts must be assembled before it applies"); *United States* v. *Luce*, 726 F.2d 47, 49 (1st Cir. 1984) ("Congress clearly intended this common sense interpretation"). After all, many ordinary products (including rifles and shotguns) are commonly sold in a partially unassembled state, and to say that a product thus produced has not been "made" until it has been fully assembled by the purchaser runs counter to "ordinary common sense" (App., *infra*, 31a).[5]

Indeed, to conclude that a manufacturer does not "make" a firearm if the weapon is shipped and sold in a partially unassembled state is as unpersuasive as arguing that a bicycle manufacturer does not "make" a bicycle if it is shipped or sold with the handlebars and seat unattached. See note 5, *supra*. If a firearms manufacturer packages as a unit all of the parts needed readily to assemble a firearm, the manufacturer has "made" a firearm in any ordinary sense of the term. See *United States* v. *Woods*, 560 F.2d at 665 ("to reason otherwise would be to frustrate or defeat the very purpose of the statute"). If the contrary were true, any manufacturer would be able to avoid the tax and registration requirements of the Act by the rudimentary artifice of marketing its products in a "kit" form that requires some assembly by the purchaser.

2. The court of appeals erred in its reliance on other portions of the statute in forming its conclusion

[5] For example, rifles are packaged, shipped and sold with their bolts (and sometimes other parts) detached. Shotguns are manufactured and marketed with removable barrels. But it could hardly be said that gun manufacturers such as Remington Arms, Uzi and Thompson therefore do not "manufacture" guns. That would be like saying that Schwinn does not "manufacture" bicycles.

that a short-barrel rifle is not "made" until it is fully assembled by the purchaser.

a. The statute defines a "rifle" to "*include* any such weapon which may be readily restored to fire a fixed cartridge." 26 U.S.C. 5845(c) (emphasis supplied). The court of appeals reasoned that, if a firearm was deemed "made" without complete assembly, then the additional statutory coverage of firearms that "may be readily restored" to use would be superfluous (App., *infra*, 6a).

That reasoning is erroneous. A complete but partially unassembled weapon, such as the Contender with its conversion kit, is a "rifle" because, when fully assembled, it falls squarely within the definition of a rifle. A weapon that once was a rifle, but which now lacks some essential component—such as a firing pin—is "*include*[*d*]" within the statutory definition of a "rifle" if it "may be readily restored" to use (26 U.S.C. 5845(c)).[6] See *United States* v. *Smith*, 477 F.2d 399 (8th Cir. 1973) (per curiam) (even though the barrel was welded shut, it could be "readily restored" to use in eight hours); *United States* v. *Catanzaro*, 368 F. Supp. 450, 452 n.3, 453 (D. Conn. 1973) (weapon could be "readily restored" to use in "approximately one hour").[7]

[6] In adding the "readily restored" language to the statute, "Congress specifically intended to overcome *United States* v. *Thompson*, 202 F. Supp. 503 (N.D. Cal. 1962), holding that a firearm with a missing firing pin was not a firearm under the Act." *United States* v. *Drasen*, 845 F.2d at 736 (citing S. Rep. No. 1501, 90th Cong., 2d Sess. 46 (1968)).

[7] By contrast, the Contender model and conversion kit can be assembled into a short-barrel rifle in less than five minutes (App., *infra*, 29a).

Indeed, the statutory inclusion of incomplete or non-functioning firearms that can be "readily restored" to use *supports* the conclusion that the statute also applies to complete, but partially unassembled firearms kits. There is no reason to suppose that Congress would have intended to "include" weapons that require hours of reassembly within the definition of a "rifle" but exclude weapons that require "only a brief and a minimal effort * * * to assemble" from the manufacturer's kit. *United States* v. *Endicott*, 803 F.2d 506, 508 (9th Cir. 1986). As the Seventh Circuit concluded in rejecting this same argument, a "rifle that has been disassembled for some reason is clearly in the same category as an identical collection of rifle parts that has not yet been assembled. The statute covers both." *United States* v. *Drasen*, 845 F.2d at 736.

b. The statutory definitions of "machine guns," "destructive devices," and "silencers" differ from the statutory definition of "rifle" in that the former include any "combination of parts" that can be used to convert a non-regulated weapon into the regulated form. Compare 26 U.S.C. 5845(b) and (f), 5845 (a)(7), with 26 U.S.C. 5845(a)(3). In this case, the court of appeals reasoned that Congress must have intended to exclude a "conversion kit" from the definition of a short-barrel rifle since it chose not to regulate a "combination of parts" that could be used to convert a non-regulated weapon into such a "rifle" (App., *infra*, 7a-8a).

The court's analysis, however, misperceived the very issue before it in this case. The conversion kit *by itself* might indeed be said to be a "combination of parts" intended for use in converting a non-regulated weapon to regulated form, but this case does not present the question whether the Thompson conversion

kit is regulated *by itself* as a firearm under the Act.[8] Instead, this case presents the question whether the conversion kit *when possessed or distributed together with the pistol*—in a unit that constitutes a complete, partially unassembled short-barrel rifle—is regulated as a firearm under the Act. 26 U.S.C. 5845(a)(3). As the Seventh Circuit stated in *United States* v. *Drasen*, 845 F.2d at 737, "we are concerned [in this case] only with a complete parts kit for short barrel rifles." With respect to a complete parts kit, the courts of appeals consistently have held heretofore that "the statute does not specify that the parts must be assembled before the statute applies." *United States* v. *Woods*, 560 F.2d at 665. See also *United States* v. *Kokin*, 365 F.2d at 596.

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[8] Congress evidently perceived "machineguns" and other "destructive devices" to be so inherently dangerous that it provided that a conversion kit that could be used to create such weapons is itself regulated under the Act. See S. Rep. No. 1501, *supra*, at 45-46 (referring to the "combination of parts" used to convert a weapon to a machine gun as a "so-called conversion kit[]"). As the Seventh Circuit stated in *United States* v. *Drasen*, 845 F. 2d at 737:

> Parts for [weapons such as machine guns and destructive devices], which are regulated without limitation, are therefore parts with only one purpose, so that a single part could reasonably be subject to regulation.

The statutory inclusion of "conversion kits" used for making "machineguns" or other "destructive devices" is not a basis for excluding a "complete parts kit" used for a short-barrel rifle under the Act. *Ibid.* For example, in *United States* v. *Kokin*, 365 F.2d 595 (3d Cir.), cert. denied, 385 U.S. 987 (1966), which was decided before the "combination of parts" language was added to the statutory definition of "machinegun," the court held that an unregulated carbine "together with all the parts necessary to convert it into * * * [a] machine gun" constituted a regulated "machine gun" under the Act. *Id.* at 596.

3. In reaching its conclusion that a complete parts kit—which takes less than five minutes to assemble into a short-barrel rifle—is not a "firearm" under the Act, the court of appeals ignored this Court's admonition that the language of a statute should "not be distorted under the guise of construction, or so limited by construction as to defeat the manifest intent of Congress." *United States* v. *Alpers*, 338 U.S. 680, 681-682 (1950). Despite the court of appeals' attempted assurances to the contrary (App., *infra*, 16a-17a), the decision in this case also quite plainly conflicts with decisions of the other courts of appeals.

Prior to the decision in this case, the courts of appeals had uniformly held that a complete, but partially unassembled, weapon constitutes a "firearm" under the Act. See, *e.g.*, *United States* v. *Drasen*, 845 F.2d at 736-737; *United States* v. *Endicott*, 803 F.2d 506, 508 (9th Cir. 1986) (a complete kit to make a silencer is regulated "although its parts are not assembled * * * [if] only a brief and a minimal effort is required to assemble the complete design by reason of the nature and location of the parts"); *United States* v. *Woods*, 560 F.2d at 665. In so ruling, these courts specifically addressed and rejected the very arguments that the court of appeals accepted in this case. See, *e.g.*, *ibid.* (the statute "does not specify that the parts must be assembled before it applies").

Notwithstanding these clearly contrary decisions, the only opinion that the court of appeals acknowledged to be "arguably inconsistent" (App., *infra*, 17a) with its analysis was *United States* v. *Drasen*, *supra*. In *Drasen*, the Seventh Circuit concluded that a complete, but partially unassembled rifle kit, "which might or might not be assembled to form a short-barrel rifle" (845 F.2d at 732), is a "firearm" within the meaning of the Act.[9] The *Drasen* court specifically rejected the claim—accepted by the court of appeals in this case—that "the statute did not cover unassembled rifles that had never been assembled" (*ibid.*). The fact that the partially unassembled kit could readily be assembled into a regulated firearm was sufficient to bring the weapon within the scope of the Act. *Id.* at 735 ("[c]ommon sense permits no other conclusion").

The decision in this case also conflicts with the reasoning of *United States* v. *Luce*, 726 F. at 49, and *United States* v. *Endicott*, 803 F. 2d at 508, where the courts held that unassembled component parts of "silencers" constitute "firearms" within the meaning of the Act (26 U.S.C. 5845(a)(7)). As the First Circuit stated in *United States* v. *Luce*, 726 F.2d at 48-49:[10]

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[9] The court of appeals erred in stating that *Drasen* is distinguishable from the present case on the ground that the parts kits in *Drasen* "could *only* be assembled as illegal firearms" (App., *infra*, 17a). The *Drasen* court specifically applied the statute to unassembled kits that "might or might not" be assembled in the form of a regulated firearm. See 845 F.2d at 732. Moreover, the court's purported distinction of *Drasen* has no bearing on whether a complete but partially unassembled kit falls within the "firearm" definition of the Act. When a weapon falls within the scope of the "firearm" definition, the fact that it might also have a non-regulated form would not be a basis for failing to comply with the registration and tax requirements of the Act. See 26 U.S.C. 5841(b), 5845(a).

[10] At the time *Luce* and *Endicott* were decided, the statutory definition of a silencer did *not* include the "combination of parts" language used in connection with other regulated devices. Compare 18 U.S.C. 921(a)(24) (added by the Firearms Owners' Protection Act, Pub. L. No. 99-308, § 101,

> Though [Section] 5845(a) does not expressly define 'silencer' to include component parts of a silencer that are 'readily available [and assembled] with only a brief and minimal effort,' we agree with the district court that Congress clearly intended this common sense interpretation.

The court of appeals attempted to distinguish *Luce* and *Endicott* on the ground that the short-barrel Contender rifle, unlike the silencers involved in those cases, is not a "ganster-type" device (App., *infra*, 15a). But Congress did not limit its broad definition of "rifles" to weapons that are subjectively dangerous, reprehensible or powerful. A short-barrel rifle is regulated without regard to the purported sporting interests of its manufacturer or the court's perception of the suitability of the weapon for criminal purposes. The plain language of the statute simply does not permit the distinction between "good" and "bad" short-barrel rifles that the court of appeals seeks to draw. See 26 U.S.C. 5845(a)(3) (regulating all rifles "having a barrel or barrels of less than 16 inches in length"). Whether the short-barrel rifle is an Uzi (see *United States* v. *Combs*, 762 F.2d 1343 (9th Cir. 1985)) or a Thompson is not relevant under the Act: what is relevant is that the rifle has a short barrel.[11]

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100 Stat. 449). The courts there nevertheless held that an unassembled silencer is a firearm under the Act. See also note 8, *supra*.

[11] The court of appeals erred in relying (App., *infra*, 17a-18a) on *United States* v. *Combs*, 762 F.2d 1343 (9th Cir. 1985), for the proposition that the weapon must be fully assembled to constitute a "firearm." In that case, the defendant was found in possession of an Uzi carbine that already had a short-barrel attached to it. *Id.* at 1345. No

4. The decision of the court of appeals poses a serious threat to civil and criminal enforcement of the National Firearms Act. While the court of appeals apparently believed that this case merely presented the question of *who* pays the excise tax (the manufacturer or the purchaser who assembles the firearm) (App., *infra*, 4a), the opinion drastically diminishes the breadth of the statute by requiring that a firearm be fully assembled to be subject to regulation (App., *infra*, 5a). Since the same statutory definitions apply equally to the civil and criminal enforcement sections of the Act, it is obvious that this decision will be relied upon by defendants who will claim that the government must now prove that the complete, but partially unassembled weapon found in their possession had once been fully assembled in the form of a regulated firearm.[12] Manufacturers and importers of regulated firearms can be expected to seek to circumvent the Act in like manner. The comprehensive statutory scheme that Congress sought to erect would be rendered quite ineffective by the simple expedient of partial disassembly.

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one has ever questioned that a firearm is "made" if a short-barrel is already attached to the rifle. The question presented in this case, which the Ninth Circuit had no need to consider in *Combs*, is whether a pistol possessed together with a conversion kit that enables the pistol to be readily converted into a short-barrel rifle constitutes a "firearm," regardless of whether the parts have actually been assembled in that form.

[12] As the cases cited in this brief reflect, prosecutions under the National Firearms Act quite often involve weapons that are recovered in a partially unassembled state. See *United States* v. *Drasen*, 845 F.2d at 736-737; *United States* v. *Endicott*, 803 F.2d at 508; *United States* v. *Luce*, 726 F.2d at 49; *United States* v. *Woods*, 560 F.2d at 665; *United States* v. *Kokin*, 365 F.2d at 596.

Requiring criminal prosecutions to depend upon the fortuity of recovering a cache of "fully assembled" weapons would frustrate the important statutory purpose of discouraging trafficking in potentially dangerous firearms. While the Thompson short-barrel rifle is not itself a weapon of mass destruction, it would be simple enough to drive an Uzi through the eye of the Federal Circuit's needle. Congress manifestly never intended the "nonsensical" result that only fully assembled weapons come within the purview of the Act. See *United States* v. *Drasen*, 845 F.2d at 736.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 1991

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

90-5091

THOMPSON/CENTER ARMS COMPANY,
a Division of the K.W. THOMPSON
TOOL COMPANY, INC., PLAINTIFF-APPELLANT

v.

THE UNITED STATES, DEFENDANT-APPELLEE

Appealed from: U.S. Claims Court
Judge Margolis

DECIDED: January 30, 1991

Before RICH, MAYER, and MICHEL, *Circuit Judges.*

MAYER, *Circuit Judge.*

OPINION

Thompson/Center Arms Company, a division of the K.W. Thompson Tool Company, Inc. (Thompson), appeals the judgment of the United States Claims Court dismissing its tax refund complaint. *See* 19 Cl. Ct. 725 (1990). We reverse.

Background

Thompson is a federally licensed sporting arms manufacturer. It has designed and manufactures for hunting, target shooting, and other sporting purposes a single shot pistol with a 10 inch barrel called a "Contender". For a brief period in 1985, Thompson also manufactured a "Contender Carbine Kit" consisting of a 21 inch barrel, a wooden foreend, and a shoulder stock. Other manufacturers had been selling similar conversion kits for the Contender since the late 1960s. Using Thompson's kit and the receiver of the Contender pistol, a purchaser can convert the pistol to a single shot carbine rifle with either a 21 inch or 10 inch barrel. The kit instructions, packaging, and advertising contain detailed warnings that making a carbine rifle with the 10 inch barrel is a violation of federal law. In addition, Thompson printed the phrase "Warning. Federal Law prohibits use with barrel less than 16 inches" on each carbine shoulder stock.

Thompson included the warnings on the advice of Rex Davis, in 1971 the Acting Director of the Alcohol, Tobacco, and Firearms Division of the Internal Revenue Service in the Department of the Treasury (ATF). In January of 1971, Thompson's president had written ATF and asked whether it would be legal to use the Contender pistol receiver with an 18 inch barrel and full shoulder stock to make a single shot carbine. Davis replied that "the manufacture of a carbine . . . by utilizing a pistol action[] would be legal and the firearm so produced would not come within the purview of the National Firearms Act [26 U.S.C. §§ 5801-72 (1988)]." However, he suggested that "it would be in the public interest" for

Thompson to include warnings like those accompanying the Contender carbine kit.

Thompson interpreted Davis's opinion as encompassing its Contender pistol and carbine conversion kit. The agency interpreted it differently. Shortly after Thompson began producing its kit in 1985, the Director of the Bureau of Alcohol, Tobacco and Firearms (BATF, formerly ATF), informed it that the kit and pistol together were a firearm subject to the National Firearms Act. In BATF's opinion, possession of an unassembled kit with a Contender pistol was the same as possession of "a rifle having a barrel or barrels less than 16 inches in length," which section 5845(a)(3) of the Act defines as a "firearm" and to which the $200 "making" tax of section 5821 therefore applies. *See* 26 U.S.C. §§ 5821, 5845 (1988). However, BATF conceded that a complete 21 inch carbine rifle and complete pistol—each with its own receiver—do not come within the Act unless *actually assembled* as a "firearm", like a short-barreled "rifle", defined in section 5845.

When BATF adhered to this position on reconsideration, Thompson stopped producing the Contender carbine kit and filed suit in federal district court seeking a declaratory judgment that the pistol and kit were not a "firearm" as defined in the National Firearms Act. The court dismissed for lack of subject matter jurisdiction, noting that Thompson had to pay the disputed tax and file an administrative claim for refund before suing for a refund. *Thompson/Center Arms Co. v. Baker*, 686 F. Supp. 38, 43 (D.N.H. 1988). Thompson subsequently paid the section 5821 tax and filed a refund claim with BATF. When BATF failed to act on the claim for more than six months, Thompson invoked the Tucker Act, 28 U.S.C. § 1491 (1988), and sued for a refund

in the Claims Court. On cross motions for summary judgment, the court agreed with BATF: the Contender pistol, when possessed in conjunction with the carbine kit, is a "firearm" as defined in section 5845(a)(3). 19 Cl. Ct. at 731. Accordingly, it dismissed the complaint and Thompson appeals.

Discussion

Section 5821 of the National Firearms Act (NFA or Act) requires any person making a firearm to pay a $200 tax on each. 26 U.S.C. § 5821 (1988). The question in this case is who "makes" a NFA "firearm" and therefore is liable for the tax [1]: Thompson, when it separately manufactures the Contender pistol and carbine conversion kit, or the person possessing both a pistol and kit, when and if he actually assembles a 10 inch rifle? In our view, the National Firearms Act answers, "the latter."

A. The Current Act

26 U.S.C. § 5845(a) (1988) defines "firearm" to include "(3) a rifle *having* a barrel or barrels of less than 16 inches in length; (4) a weapon *made* from a rifle if such weapon *as modified* has an overall length of less than 26 inches or a barrel or barrels of less than 16 inches in length." *Id.* (emphasis added). The emphasized words strongly suggest that, to meet either definition, a short-barreled rifle [2] actually must

[1] The Act imposes several other requirements on persons making or dealing in firearms, but none is relevant here. *See* 26 U.S.C. §§ 5801 (occupational tax), 5811 (transfer tax), 5841 (firearms registration); *see also* 686 F. Supp. at 39.

[2] We use the term "short-barreled rifle" to describe a weapon meeting the definition in either section 5845(a)(3) or (a)(4). *Cf.* 18 U.S.C. § 921(a)(8) (Gun Control Act definition of "short-barreled rifle").

be assembled. Congress knows the difference between "*could* have," "*could* be made," and "*could* be modified," on the one hand, and the terms and phrases it chose to use, on the other.

Section 5845(c) supports this common-sense interpretation. It defines "rifle" as:

> a weapon *designed* or redesigned, *made* or remade, and *intended* to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed cartridge to fire only a single projectile through a rifled bore for each single pull of the trigger, and shall include any such weapon which may be *readily restored* to fire a fixed cartridge.

Again the underscored words suggest that a rifle meeting this definition must physically exist. In particular, the ordinary meaning of "restore" is to put back in a pre-existing condition. *Webster's Third New International Dictionary* 1936 (17th ed. 1976). One cannot restore rifle form, readily or otherwise, a separate pistol and carbine conversion kit that previously have not been combined.

The statutory definition of "make" also supports this interpretation. "The term 'make', and the various derivatives of such word, shall include manufacturing . . . , putting together, altering, any combination of these, or otherwise producing a firearm." 26 U.S.C. § 5845(i). The import is clear: a statutory firearm must exist in fact, not in contemplation, to be "made" within the meaning of the statute. *How* a firearm is "made" is irrelevant; that it exist is not. *Cf. United States v. Drasen*, 845 F.2d 731, 736-37

(7th Cir. 1988). Of course, the term "make" can be modified by "could" or similar language indicating that the potential or likely existence of a firearm is enough. But Congress did not use that language in defining "rifle".

Finally, section 5822 suggests that Congress expected individual persons, in some circumstances, to make firearms subject to the Act. It provides that no person shall make a firearm unless he has filed with the Secretary of the Treasury an application to make and register the firearm and has "identified himself in the application form in such manner as the Secretary may by regulations prescribe, except that, if such person is an individual, the identification must include his fingerprints and his photograph." 26 U.S.C. § 5822. In our view, this provision contemplates the individual owner of a Contender pistol and carbine conversion kit who actually makes a short-barreled rifle, no less than the owner of an otherwise legal and unregulated long rifle or shotgun who saws off the barrel. *See, e.g., United States v. Rose*, 695 F.2d 1356 (10th Cir. 1982).

Our reading of the Act is not a hypertechnical, excessively stingy construction that ignores or frustrates the statutory scheme. On the contrary, interpreting the definitions of "firearm" and "rifle" to encompass an unassembled collection of parts that *could* be made into a proscribed short-barreled rifle renders statutory language defining other types of "firearms" either awkward or superfluous. For example, Congress used the phrase "readily restored" in defining not only "rifle", but "machinegun", "shotgun", "any other firearm", and "unserviceable firearm" as well. *See* 26 U.S.C. § 5845(b), (d), (e), and (h). It deliberately did not use the phrase in the definition of "destructive device", choosing instead

to use the broader phrase "readily converted". *Id.* § 5845(f). We can find no principled difference between "restored", as interpreted by the government, and "converted", as commonly understood: to change from one (unregulated) form into another (regulated) form. *Webster's Third New International Dictionary* 499. Therefore, to adopt the government's construction of the term "rifle" requires us to read out of the statute either the word "converted" in section 5845(f) or the word "restored" in section 5845(b)-(e) and (h). We see no justification for this, especially when according the words their ordinary meanings makes the most sense of the statute.

More importantly, interpreting the definition of "rifle" to cover the unassembled combination of a Contender pistol and carbine conversion kit makes "combination of parts" language elsewhere in the statute superfluous. For example, section 5845(b) defines "machinegun" to include "any *combination of parts* from which a machinegun *can be assembled* if such parts are in the possession or under the control of a person." 26 U.S.C. § 5845(b) (emphasis added). Section 5845(f) similarly defines "destructive device" as "any *combination of parts* either designed or intended for use in converting any device into a destructive device . . . and from which a destructive device *may be readily assembled.*" *Id.* § 5845(f) (emphasis added). Finally, section 5845(a)(7) defines "firearm silencer" (by reference to section 921(a)(24) of the Gun Control Act of 1968, 18 U.S.C. §§ 921-930) to include "any *combination of parts*, designed or redesigned, and *intended for use in assembling* or fabricating a firearm silencer . . . ." 26 U.S.C. § 5845(a)(7); 18 U.S.C. § 921(a)(24) (emphasis added). We do not believe Con-

gress intended courts to supply by interpretation in section 5845(c) what it provided by express language in section 5845(a)(7), (b), and (f).

B. Legislative History

Only very clear evidence of contrary legislative intent can displace the plain meaning of a statute. *Aaron v. SEC*, 446 U.S. 680, 697 (1980); *Johns-Manville Corp. v. United States*, 855 F.2d 1556, 1559 (Fed. Cir. 1988). Nothing in the history of the National Firearms Act contravenes our reading.

As originally enacted in 1934, the National Firearms Act did not define "rifle". Act of June 26, 1934, 48 Stat. 1236. Though Congress subsequently amended relevant portions of the Act five times and added a definition of "rifle" which it twice specifically altered, it never added language purporting to reach unassembled short-barreled rifle parts. That it did add "combination of parts" language in the case of machineguns, destructive devices, and silencers strongly suggests that it does not intend the Act to cover unassembled pistol conversion kits of the type at issue here.

Congress added definitions of "rifle", "shotgun", and "any other weapon" to the Act in 1954. Internal Revenue Code of 1954, Pub. L. No. 83-591, 68A Stat. 3 (codified at 26 U.S.C. § 5848 (1954)). The original definition of "rifle" read:

> The term "rifle" means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and *designed and made* to use the energy of the explosive in a fixed metallic cartridge to fire only a single projectile through a rifled bore for each single pull of the trigger.

26 U.S.C. § 5848(3) (emphasis added). The accompanying House report explained that the definitions of "rifle", "shotgun", and "any other weapon" were added to *exclude* firearms like blunderbusses, muzzle-loading shotguns, and other ancient or antique guns from the Act's reach, "in pursuance of the clearly indicated congressional intent to cover under the National Firearms Act only such modern and lethal weapons . . . as could be readily and efficiently used by criminals and gangsters." H.R. Rep. No. 1337, 83d Cong., 2d Sess. 524, *reprinted in* 1954 U.S. Code Cong. & Admin. News 4019, 4542.

Congress amended the definition of "rifle" four years later by inserting the phrase "designed or redesigned and made or remade" in lieu of the underscored language. Excise Tax Technical Changes Act of 1958, Pub. L. No. 85-859, § 203(f), 72 Stat. 1275, 1427 (1958). The change was intended "to clarify the intent of this section and is in accordance with the administrative construction of existing law." S. Rep. No. 2090, 85th Cong., 2d Sess. 9, *reprinted in* 1958 U.S. Code Cong. & Admin. News 4395, 4603. Part of that administrative construction is a 1954 revenue ruling, later revoked, *see* Rev. Rul. 72-178, 1972-1 C.B. 423-24, that stated "the possession or control of sufficient parts to assemble an operative firearm constitutes the possession of a firearm, and the transfer of sufficient parts to assemble an operative firearm constitutes the transfer of a firearm . . . ." Rev. Rul. 54-606, 1954-2 C.B. 33. The government relies on the single sentence quoted above from the legislative history of the 1958 amendment and a similar statement in the legislative history of the 1968 amendments to the "rifle" definition, *see* S. Rep. No. 1501, 90th Cong., 2d Sess. 46 (1968), to estab-

lish that Congress intended to "adopt" the construction in Revenue Ruling 54-606.

The argument is untenable. Revenue Ruling 54-606 is a substantial and, in our view, unwarranted extension of the statute's plain meaning; we do not think Congress would adopt so sweeping an administrative "amendment" without explicitly mentioning it. *See Drasen*, 845 F.2d at 738-39 (Manion, J., dissenting); *United States v. Lauchli*, 371 F.2d 303, 312 (7th Cir. 1966) ("we need not go as far as the Internal Revenue Ruling [54-606]"). This is especially so when the manner in which Congress *did* amend the statute—replacing "designed and made" with "designed or redesigned and made or remade"—does not even vaguely reflect, let alone clearly implement, the administrative construction assertedly adopted.

Congress again failed to adopt that construction in 1968 when, in title II of the Gun Control Act of 1968, it generally revised the entire National Firearms Act.[3] Title II modified the definition of "firearm", "machinegun", "rifle", "shotgun", and "any other weapon" and added definitions of "destructive device" and "make". Gun Control Act of 1968, Pub. L. No. 90-618, title II, 82 Stat. 1213, 1227 (1968). The definition of "firearm" was expanded to include both a weapon made from a rifle that has a barrel less than 16 inches in length (regardless of the weapon's overall length) and a "destructive device". *See* 26 U.S.C. § 5845(a)(4), (8) (1982); S. Rep. 1501, 90th Cong., 2d Sess. 45 (1968) [hereinafter S. Rep. No. 1501]. The "rifle" definition was modified by deleting the limitation that cartridges fired be "metallic" and, more importantly, by adding the phrase "and shall include any such weapon which may be *readily restored* to fire a fixed cartridge." 26 U.S.C. § 5845(c) (1982). The Senate report explains: "the definition has been clarified to specifically include any such weapon which may be readily restored to fire a fixed cartridge. The . . . change is consistent with the administrative construction of existing law." S. Rep. No. 1501 at 46.

Congress simultaneously added "readily restored" language to the definitions of "machinegun", "shotgun", and "any other weapon", explaining in the context of "shotgun" that

> The clarification is consistent with the administrative construction of existing law. However, a district court held that a shotgun with a missing firing pin was not a firearm as defined in the National Firearms Act. This change is intended to make it completely clear that that court decision [*United States v. Thompson*, 202 F. Supp. 503 (N.D. Cal. 1962)] is not consistent with the intended coverage of this subsection.

[3] Congress also amended the Act in 1960, but it did not change the "rifle" definition. Instead, it altered the definition of "firearm" to include "a rifle having a barrel or barrels of less than 16 inches in length, or any weapon made from a rifle or shotgun (whether by alteration, modification, or otherwise) if such weapon as modified has an overall length of less than 26 inches . . . ." Pub. L. No. 86-478, § 3, 74 Stat. 149 (1960). The purpose of the amendment was two-fold: to exclude from the definition of "firearm" a number of popular sporting rifles having a barrel length slightly under 18 inches (considered firearms under previous law), and to ease administration of the Act. S. Rep. No. 1303, 86th Cong., 2d Sess. 3, *reprinted in* 1960 U.S. Code Cong. & Admin. News 2111, 2113. The amendment is relevant as an example of Congress once again turning its attention to the type of rifles it wanted to regulate under the NFA and, once again, declining to cover combinations of rifle parts.

S. Rep. No. 1501 at 46. Therefore, it appears that by adding the "readily restored" language to the definitions of "machinegun", "rifle", "shotgun", and "any other weapon", Congress intended to preempt judicial decisions exempting weapons from the coverage of the Act solely because they lacked firing pins.[4] Rather than repeat this explanation for each of the sections affected, it summarily said the change was "consistent with" an unspecified administrative construction of existing law. Contrary to the government's argument, Congress did not say, and there is no evidence to suggest, that it intended to "adopt" any specific construction, in particular that given the statute in Revenue Ruling 54-606.

Indeed, the 1968 amendments to the "machinegun" definition and the addition of a "destructive device" definition both illustrate that, "where Congress intended to regulate combinations of parts, it did so precisely and explicitly." *Drasen*, 845 F.2d at 738

[4] The government cites *United States v. Woods*, 560 F.2d 660 (5th Cir. 1977), for the proposition that the "readily restored" language of section 5845(d) encompasses an unassembled sawed-off shotgun. *Woods* addresses whether probable cause existed to believe that what looked like a sawed-off shotgun barrel was contraband, thus justifying the subsequent search for the gun's stock and the seizure of both barrel and stock. Therefore, the court's discussion of whether the two unassembled pieces in fact comprised a firearm within the meaning of section 5845(d) is dictum. Moreover, we could agree with the *Woods* dictum but still hold for Thompson. Though the shotgun was in two pieces when found, the court apparently assumed the gun previously had been assembled. *See* 560 F.2d at 664. Finally, in contrast to the Contender pistol and carbine conversion kit, the two pieces could *only* be assembled as a short-barreled shotgun regulated by the Act. *Id.*

(Manion, J., dissenting). The amended definition of "machinegun"

> provides three new categories as included within the term "machinegun": (1) the frame or receiver of a machinegun, (2) *any combination of parts* designed and intended for use in converting a weapon other than a machinegun into a machinegun; *for example, so-called conversion kits*, and (3) *any combination of parts* from which a machinegun can be assembled if such parts are in the possession of a person.

S. Rep. No. 1501 at 45-46 (emphasis added). It is not by accident or oversight that Congress amended the definition of "machinegun" but not "rifle" to include unassembled parts, particularly conversion kits.[5] Though it is unclear whether competitors of Thompson manufactured conversion kits for the Contender pistol prior to 1968—according to the uncontroverted affidavit of Thompson's president Robert L. Gustafson, the Contender pistol has been manufactured continuously since 1967 and conversion kits have been marketed since the late 1960s—thousands

[5] *United States v. Kokin*, 365 F.2d 595 (3d Cir. 1966), and *United States v. Lauchli*, 371 F.2d 303 (7th Cir. 1966), decided prior to the 1968 amendments, do not establish the proposition for which the government cites them—"that the transfer of parts from which operative machine guns could be assembled constituted the transfer of machine guns under the Act"—and do not otherwise support its argument. In both cases, the defendant actually assembled some of the parts as complete machine guns, and the parts could *only* be assembled as firearms within the meaning of the Act. *See* 371 F.2d at 313. Moreover, in *Lauchli* at least, the transferees demanded complete and operable machineguns and the defendant gave them a booklet explaining how to so assemble them.

of the kits existed when, in 1986, Congress again amended the Act and again declined to add combination of parts language to the definition of "rifle". *See* Firearms Owners' Protection Act, Pub. L. No. 99-308, § 109, 100 Stat. 449, 460 (1986).

Finally, what is true of the amended definition of "machinegun" is true of the added definition of "destructive device". The term includes "*any combination of parts* either designed or intended for use in converting any device into a destructive device . . . and from which a destructive device may be readily assembled." 26 U.S.C. § 5845(f) (1982). That Congress deliberately included "combination of parts" language in the definition of "destructive device" strongly suggests that it did not inadvertently omit similar language in the definition of "rifle".

As mentioned above, Congress last amended the National Firearms Act in 1986. Again the amendments demonstrate that when Congress intends to regulate unassembled parts, it does so explicitly. Section 109 of the Firearms Owners' Protection Act amended the definition of "firearm" in section 5845(a) to include "(7) any silencer (as defined in section 921 of title 18, United States Code)." 100 Stat. at 460. Section 101 of the same act adds to section 921 of title 18 the following definition:

> (24) The terms "firearm silencer" and "firearm muffler" mean any device for silencing, muffling, or diminishing the report of a portable firearm, *including any combination of parts*, designed or redesigned and intended for use in assembling or fabricating a firearm silencer or firearm muffler, *and any part* intended only for use in such assembly or fabrication.

100 Stat. at 451; *see* 18 U.S.C. § 921(a)(24).[6] Congress reiterated in the preamble to the act what it had first stated in section 101 of the Gun Control Act of 1968: "it is not the purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms appropriate to the purpose of hunting . . . target shooting . . . or any other lawful activity . . . ." 100 Stat. at 449. This admonition, were it even necessary, requires us to decline the government's invitation to expand the definition of "rifle" to encompass the Contender pistol and carbine conversion kit. The government admits that both pistol and carbine are intended and primarily used for the legitimate purposes of hunting and target shooting. Thus, even if we adopted the policy-driven mode of analysis used in *United States v. Endicott*, 803 F.2d 506 (9th Cir. 1986), and *United States v. Luce*, 726 F.2d 47 (1st Cir. 1984), cases holding that the pre-1986 version of section 5845(a)(1) included component parts of a silencer, we would reach the same conclusion. Unlike a silencer, the Contender pistol and carbine are admittedly not " 'ganster-type' devices". *Luce*, 726 F.2d at 49.

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[6] A companion law to the Firearms Owners' Protection Act amended the definition of "ammunition" in § 921(a)(17) of the Gun Control Act by adding a new subsection defining "armor piercing ammunition". *See* Pub. L. No. 99-408, § 1, 100 Stat. 920 (1986). Section 10 of that law provides, "For purposes of section 921(a)(17)(B) of title 18 . . . 'handgun' means any firearm including a pistol or revolver designed to be fired by the use of a single hand. The term also includes *any combination of parts* from which a handgun can be assembled." 100 Stat. at 922; *see* 18 U.S.C. § 921 note.

C. Cases Construing "Rifle"

With one exception, other cases construing the word "rifle" are consistent with our interpretation. For example, *United States v. Combs*, 762 F.2d 1343 (9th Cir. 1985), affirmed Combs's conviction for possessing an unregistered firearm in violation of sections 5841 and 5861(d) of the Act. In response to Combs's argument that he did not "make" a firearm which section 5841 would require him to register, the court observed,

> [t]he government offered expert testimony that when Combs replaced the Uzi's 16-inch barrel with a 9¼-inch barrel he altered the Uzi from a legal rifle to an illegal concealable pistol. . . . The evidence at trial indicated that the barrel originally attached to the rifle was detached and the shortened barrel installed in its place. Combs was found in possession of the Uzi with the shortened barrel, and the barrel of legal length with which the Uzi is sold in the United States was found in the back of his truck along with the case for the Uzi. From the evidence presented at trial, there was sufficient evidence for the jury to conclude that Combs bought the shorter barrel and installed it. *Thus the Uzi was altered by Combs and therefore was "made" within the terms of the statute.*

762 F.2d at 1347. Like the Contender pistol and carbine conversion kit, the Uzi submachinegun and separate 9¼-inch barrel can be assembled as either a legal carbine or a proscribed short-barreled 90-5091 rifle. Moreover, like the Contender, the Uzi is sold with an imprinted warning (also appearing in the instruction manual) that replacing the 16-inch barrel with a shorter barrel creates an illegal weapon. *Id.* We think *Combs* correctly held that a short-barreled rifle is "made", i.e., that a firearm within the meaning of section 5845(a)(3) or (4) exists, when its component parts are actually assembled as such. *See also United States v. Rose*, 695 F.2d 1356 (10th Cir. 1982) (Uzi submachine guns with barrels sawed off to a length less than 16 inches are rifles as defined in the National Firearms Act; sawing off the barrels constitutes "making" an illegal firearm).

Only *United States v. Drasen*, 845 F.2d 731 (7th Cir. 1988), is arguably inconsistent. That case held that complete but unassembled short-barrel rifle parts kits were "rifles" within the meaning of section 5845(c). Like the other cases on which the government relies—*Woods*, *Lauchli*, *Kokin*, *Endicott*, and *Luce*—*Drasen* involved unassembled parts that could *only* be assembled as illegal firearms. This distinction, if not dispositive, is important. *Drasen* is also inconsistent with an earlier Seventh Circuit case, *United States v. Zeidman*, 444 F.2d 1051 (1971), in which the court upheld Zeidman's conviction for possessing an illegal short-barreled rifle which, though in two pieces when seized, previously had been assembled in the presence of Zeidman by an undercover government investigator. The court observed "*Once the two parts are attached in rifle form*, it becomes clear that the single unit fits the definition of a short barreled rifle." *Id.* at 1053 (emphasis added). To the extent, if any, that *Drasen* is inconsistent with our decision here, we decline to follow it.

Conclusion

Accordingly, the judgment of the Claims Court is reversed.

REVERSED

APPENDIX B

IN THE UNITED STATES CLAIMS COURT

No. 652-88T

(Filed March 23, 1990)

THOMPSON/CENTER ARMS COMPANY,
A DIVISION OF THE K.W. THOMPSON
TOOL COMPANY, INC., PLAINTIFF
v.
THE UNITED STATES, DEFENDANT

Taxes; excise tax; National Firearms Act, 26 U.S.C. § 5845(a); definitions of firearm" and "rifle"; possession of pistol and Carbine Kit constitute possession of a "firearm."

OPINION

MARGOLIS, *Judge*.

Plaintiff, a firearms manufacturer, claims a $200 tax refund, alleging that the tax was erroneously collected. The special excise tax at issue in this case is levied on the "making" of items statutorily defined as "firearms" under the National Firearms Act (NFA or Act). 26 U.S.C. § 5801 *et seq.*, § 5821. The parties disagree as to whether two of the plaintiff's products—the Contender pistol, possessed in conjunction with the Contender Carbine Kit—together comprise a "firearm" under 26 U.S.C. § 5845(a), which is thus taxable under the NFA. This case is before the court on cross motions for summary judgment. After hearing oral argument and after review of the entire record, this court grants the defendant's motion for summary judgment and denies the plaintiff's motion for summary judgment.

FACTS

Thompson/Center Arms Co., a division of the K.W. Thompson Tool Company, Inc. (TCA), a sporting arms manufacturer, manufactures the Contender pistol, a single shot pistol with a ten-inch barrel and overall length of fourteen inches. The pistol barrel is interchangeable with other barrels made by TCA. The Contender Carbine Kit (Kit), manufactured briefly by TCA in 1985, consists of a tweny-one inch barrel, a shoulder stock and a forend. These parts can be attached to the receiver of the Contender pistol to produce a single shot rifle.[1] The manufacturer's shoulder stock, packing, instructions and advertising included a warning that the use of the shoulder stock with a barrel less than sixteen inches in length would violate federal law. The warning was also embossed on the recoil pad of the shoulder stock.

The pistol is converted into a carbine by exchanging the ten-inch barrel for the twenty-one-inch barrel, and replacing the pistol grip with the shoulder

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[1] The receiver of the pistol, also called the pistol action or frame, is a metal component containing the trigger and hammer to which the barrel and either the pistol grip or the shoulder stock can be attached. The shoulder stock is a wooden support which attaches to the receiver to allow the gun to rest against the shoulder during firing. The forend, a small wooden piece, attaches under and supports the barrel.

stock. All of the necessary parts are contained in the conversion kit. The only tools required are an Allen hex wrench, screwdrivers and a hammer. Although plaintiff asserts that the pistol is not intended to be converted into a short barrel rifle, the parts are completely interchangeable. There is nothing to prevent the consumer from replacing the pistol grip with the shoulder stock, without also substituting the rifle barrel for the pistol barrel. At the request of the court, counsel for the plaintiff did exactly that, creating what all parties concede was a short barrel rifle, a firearm under the NFA.

In 1971, R. Gustafson, president of TCA, wrote to the Alcohol, Tobacco and Firearms Division of the Internal Revenue Service (ATF), requesting an informal opinion on the legality of using the Contender pistol receiver to make a single shot carbine with a barrel eighteen inches long and a full shoulder stock. The reply from Rex Davis, then Acting Director of ATF, stated that "the manufacture of a carbine . . . by utilizing a pistol action, would be legal and the firearm so produced would not come within the purview of the NFA." He also made these recommendations:

> [i]n view of the interchangeable barrel capabilities of your Contender action, we believe that it would be in the public interest for you to include a cautionary statement with each firearm. This statement would serve to advise the purchaser that any reduction of the barrel length of the carbine to less than 16 inches, whether by substitution of the carbine barrel with one of your pistol barrels or otherwise, . . . would constitute the making of a firearm within the purview of

> Section 5845(a) of the National Firearms Act . . . . To preclude the ready conversion of the carbine to a short barreled rifle through the substitution of one of your pistol barrels, you might find it advisable to vary the receivers used in the carbines in such a way so as to render them incapable of accepting your pistol barrels. We also recommend that the receivers used in the carbines be marked in some way to distinguish them from the receivers used in your pistol.

In 1985, TCA briefly produced the Contender Carbine Kit, including a warning such as the one suggested by Davis. Production was halted when TCA was advised by Stephen Higgins, Director of the Bureau of Alcohol, Tobacco and Firearms (BATF), that the Carbine Kit, possessed in conjunction with the Contender pistol, would constitute a firearm subject to the NFA. Higgins also informed TCA that the possession of a complete pistol and complete carbine would *not* be within the scope of the NFA unless the components were actually assembled as a short barrel rifle.

TCA filed suit in U.S. District Court seeking a declaratory judgment that the Contender pistol and the Contender Carbine Kit did not comprise of "firearm." The court held that it lacked subject matter jurisdiction over the case. *Thompson/Center Arms Co. v. Baker*, 686 F. Supp. 38, 44 (D.N.H. 1988). In order for the court to have subject matter jurisdiction, TCA was required to first pay the NFA tax and then sue for a refund. *Id.*

In October 1987, plaintiff submitted an Application to Make and Register a Firearm and paid the $200 tax. The application was approved by BATF in

December 1987. TCA then filed a claim for a refund of the tax payment in March 1988, claiming that no short barrel rifle was ever made, but rather that TCA had segregated and possessed as a unit the Contender pistol and the Contender Carbine Kit. TCA claims that because the component parts were never actually assembled as a short barrel rifle, no "firearm" was ever "made." TCA was never notified of the disallowance of the claim, and after more than six months had elapsed, filed this suit.

Plaintiff claims that the Contender pistol and Carbine Kit possessed as a unit and used together do not constitute a firearm under 26 U.S.C. § 5845(a)(3). Plaintiff therefore asserts that the $200 special excise tax levied on "firearms" was erroneously collected and requests a refund of that tax payment. In its complaint, plaintiff also sought declaratory judgment that the Contender pistol and Carbine Kit when possessed together as a unit did not constitute a short barrel rifle unless actually assembled as such. However, in its opposition to defendant's motion for summary judgment, plaintiff concedes that the declaratory judgment issue is moot, as a judgment on the tax refund claim would provide plaintiff with complete relief. Also, counts two and three of the complaint are not issues in this case.

The government claims that, according to both the statute and relevant case law, the pistol and the Carbine Kit, sold or held as a unit, do constitute a short barrel rifle under 26 U.S.C. § 5845(a)(3), because together they include all of the component parts of a short barrel rifle. The government contends that even though the kit *also* allows the purchaser to make a long barrel rifle (*not* a firearm under the NFA), the pistol plus the kit still constitute a firearm under

the NFA. Therefore, the government concludes that the excise tax was properly collected.

DISCUSSION

This case requires the court to interpret the NFA to determine whether the Contender pistol, possessed in conjunction with the Contender Carbine Kit, meets the statutory defintion of a "firearm" under 26 U.S.C. § 5845. The first step in construing a statute is to look to the language of the statute itself. *Greyhound Corporation v. Mt. Hood Stages, Inc.*, 437 U.S. 322, 330 (1978) (citations omitted). Of particular importance are the definitions expressed within the statutes. *Johns-Manville Corp. v. United States*, 855 F.2d 1556, 1560, *cert. denied*, 109 S. Ct. 1342 (1989). Section 5845 of the Internal Revenue Code, the definitions section of the NFA (as amended by the Firearms Owners' Protection Act of 1986, P.L. 99-308, ¶ 109), reads in pertinent part as follows:

> (a) Firearm.—
>
> The term "firearm" means
>
> * * *
>
> (3) a rifle having a barrel or barrels of less than 16 inches in length;
>
> * * *
>
> (c) Rifle.—
>
> The term "rifle" means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed cartridge to fire only a single projectile through a rifled bore for each single pull of the trigger, and shall include any

such weapon which may be readily restored to fire a fixed cartridge.

• • •

(i) Make.—

The term "make," and the various derivatives of such word, shall include manufacturing (other than by one qualified to engage in such business under this chapter), putting together, altering, any combination of these, or otherwise producing a firearm.

Plaintiff contends that the Contender pistol, possessed in conjunction with the Contender Carbine Kit, does not comprise a firearm because the two products are not, and have never been, assembled as a short barrel rifle. Plaintiff relies on the definition of the term "make" in arguing that the statute requires that the firearm be put together. This overly narrow reading of the statute is not supported by the wording of the statute, the legislative history or the applicable revenue rulings.

The statute does not specifically refer to "assembled" rifles, "unassembled" rifles or combination of parts from which rifles can be made. However, it is clear that Congress intended to include a broad range of combinations within the definition, otherwise more restrictive language would have been used. The phrase "or otherwise producing a firearm" is clearly indicative of Congressional intent to include the broadest array of combinations. Proper construction of the statute must be consistent with the obvious intent of Congress. Therefore, this court holds that the definition of the term "make" addresses not only assembled rifles, but also unassembled rifles and com-

plete parts kits from which rifles can be made. This interpretation is amply supported by the legislative history and the revenue rulings.

Legislative History of the National Firearms Act

A careful examination of the legislative history of the 1968 amendments to the National Firearms Act reveals that Congress intended to broaden the scope of the definition of "firearms," to bring more types of weapons within the ambit of the Act. H.R. Conf. Rep. No. 1956, 90th Cong., 2d Sess., *reprinted in* 1968 U.S. Code Cong. & Admin. News 4426, 4434. Plaintiff, however, argues that the amendments expanding coverage as to other weapons actually narrowed the definition of rifles subject to the Act. This court believes that the plaintiff misreads the legislative history.

In 1968, Congress added the following language to the definition of rifle: "and shall include any such weapon which may be readily restored to fire a fixed cartridge." The new language does not limit the definition of "rifle" to those rifles which had already been assembled at some time in the past. On the contrary, the change expanded the coverage of the Act. Application of the basic rules of grammar shows that Congress, in using the conjunctive "and," mean to expand its definition of what constituted a rifle. Congress closed a loophole which would allow one to try to avoid the application of the Act by simply disassembling a single part of the firearm. It is equally illogical to argue that Congress intended to include as a firearm only weapons which had been *pre*-assembled. *See United States v. Drasen*, 845 F.2d 731, 736 (7th Cir. 1988), *cert. denied*, 109 S. Ct. 262. If that were the case, persons could avoid payment of

the excise tax by selling firearms partially unassembled. Such an interpretation would subvert the intent of Congress in drafting the amendments to the Act.

It is also not the case, as plaintiff claims, that the expansion of the definitions of machineguns and silencers to include individual parts of those items somehow served to narrow the definition of rifle. It is true that the individual parts of rifles (*e.g.*, the barrel, the receiver, the shoulder stock) are not, in and of themselves firearms, because those parts can be and are used to make guns which are not firearms under the Act. In contrast, machinegun parts are used only to make firearms.

However, the government is not relying on a theory that the individual parts of the Contender pistol and the Contender Carbine Kit are each firearms under the NFA, *i.e.*, the government does not argue that the shoulder stock is itself a firearm. Rather, the government argues that the pistol and the kit *when possessed together* comprise all the requisite parts of a firearm, and therefore are the equivalent of an unassembled short barrel rifle.

The "Administrative Record"

Plaintiff has provided the court with informal opinion letters from the ATF and its successor agency, BATF. Some of those letters were addressed to TCA, and some were addressed to other companies seeking informal opinions. Plaintiff refers to these letters collectively as "the administrative record." That is somewhat of a misnomer, as those letters do not constitute the "record" of the instant case, which is a *de novo* proceeding for a tax refund, but rather describe the position of the agency in response to particular factual queries. Such letters are non-binding agency opinions. Where there is a conflict between unpublished letter opinions, and the statute and the revenue rulings interpreting that statute, the latter two control, and the letters are entitled to no weight.

Nonetheless, this court agrees with the government that each of the letter opinions is either consistent with the interpretation now urged by the government, or is sufficiently distinguishable on its facts. For example, the 1971 letter from ATF Acting Director Rex Davis to TCA which states that the use of the Contender pistol action in "making up" a carbine would not be a violation of the NFA, nowhere addressed the issue of a single pistol plus a conversion kit. Rather, the response clearly anticipated the manufacture of a complete Contender carbine using a receiver identical to the one used in making a Contender pistol. Further, that letter anticipated the problem of having weapons whose barrels are fully interchangeable and therefore capable of being assembled as an NFA firearm. That is why Davis included the recommendations set forth in his letter *supra*.

The other letters cited by plaintiff concerned two complete weapons, combinations involving curios or relics, or were otherwise factually distinguishable from the present case. Defendant agrees that the 1973 letter from ATF to another company regarding the manufacture of a "sportsmen's kit" appears to be inconsistent with the agency's current position, but notes that, to the extent a non-binding letter opinion is inconsistent with agency policy, it is "just incorrect." This court agrees with that statement, and finds nothing else in the letter opinions to support plaintiff's position.

Revenue Rulings

Unlike opinion letters, published revenue rulings are given weight, as they represent the agency's official interpretation of the statute. Those rulings show that the agency has consistently held that the possession of a pistol with an attached or attachable shoulder stock constitutes possession of a firearm within the scope of the NFA. *See* Rev. Rul. 61-45, 1961-1, C.B. 663; Rev. Rul. 61-203, 1961-2, C.B. 224. Similarly, Rev. Rul. 54-606, 1954-2, C.B. 33, held that possession of sufficient parts to assemble a firearm constitutes possession of a firearm.[2]

The rulings which plaintiff argues are inconsistent with the government's current position (Rev. Rul. 59-340, 1959-2, C.B. 375, and Rev. Rul. 59-341, 1959-2, C.B. 376) differ in significant factual ways from the present case. Neither involved a situtation in which it was even possible to combine the component parts to make a short barrel rifle. Thus, this court find that the published agency opinions interpreting the NFA are consistent with the government's position that the Contender pistol possessed in conjunction with the Contender Carbine Kit constitute a firearm under the Act.

Cases Interpreting the Statute

Various courts of appeals have held that unassembled rifles and shotguns are firearms within the § 5845 definition. In 1971, the Seventh Circuit held

[2] These revenue rulings represent the agency's interpretation of the statute prior to its amendment by the Gun Control Act of 1968. In enacting the Gun Control Act, the Congress specifically adopted previous agency interpretations in reenacting the definitions section of the statute. *See United States v. Drasen*, 845 F.2d at 736.

that an unassembled pistol and holster-shoulder stock were a short barrel rifle because, when assembled, the parts would become a short barrel rifle. *United States v. Zeidman*, 444 F.2d 1051, 1053 (7th Cir. 1971). In *United States v. Woods*, the Fifth Circuit held that an unassembled sawed-off shotgun came within the definition of a firearm, because only minimal effort was required to make it functional. 560 F.2d 660, 664-65 (5th Cir. 1977), *cert. denied*, 435 U.S. 906 (1978).

As shown by the plaintiff's own submissions and its demonstration during oral argument, the process of dismantling the Contender pistol and reassembling a Contender carbine takes less than ten minutes, and can be accomplished with simple, readily available tools. Because the barrels are fully interchangeable, a short barrel rifle could be assembled in less than five minutes—even more easily and readily than a long barrel rifle—since the barrels would not have to be changed.

The case most closely analogous to our case is *United States v. Drasen*, 845 F.2d 731. In that case, the defendant sold complete short barrel rifle parts kits. None of the kits was assembled. The court held that the *un*assembled kit is no different than a *dis*assembled rifle, because the parts could be easily assembled into a rifle. *Id.* at 736. Further, the parts of the disassembled rifle and the unassembled rifle were identical and interchangeable. Again, the court did not hold that the individual parts of the rifle were firearms; rather the parts, aggregated together as a *kit*, were the equivalent of a firearm under the NFA. In the present case, Thompson/Center Arms segregated and possessed together all of the component parts of a short barrel rifle, which were capable of

being easily and readily assembled into a short barrel rifle. The presence of the additional, interchangeable rifle barrel is of no consequence; the rifle barrel is simply an extra piece. The court concludes that TCA possessed an unassembled short barrel rifle—a firearm under the Act and under the cases construing the Act.

Intent of the User

Plaintiff argues that there would be no reason for either a sportsman or a criminal to use the Contender Carbine Kit to create a short barrel rifle because, among other things, the resulting weapon would not be accurate, would be inconcealable, and would be slow to reload. However, defendant asserts that the NFA definition of a short barrel rifle includes no intent requirement. If a rifle has a barrel less than sixteen inches long, and is not otherwise excepted (*e.g.*, relics and curios), it is a short barrel rifle. One who makes a short barrel rifle is subject to the special excise tax. That is all. This court need not and will not attempt to delve into the minds of hypothetical gun owners to speculate as to what might motivate them to use the pistol plus the kit to fashion a short barrel rifle. The court need not consider what TCA intended when it sought to market the pistol inconjunction with the carbine kit. The fact that TCA may not have intended that the two products be assembled as a short barrel rifle does not alter the fact that the pistol and the kit together comprise all of the requisite parts of such a weapon.

Ambiguity of the Statute

Finally, plaintiff cites *Auto-Ordnance Corp. v. United States* for the proposition that, in a tax refund case, where there is a doubt as to the meaning

of a revenue statute, the doubt should be resolved in favor of the taxpayer. 822 F.2d 1566, 1571 (Fed. Cir. 1987). Plaintiff correctly points out an important and longstanding canon of tax jurisprudence. However, as discussed above, the pertinent language of the NFA is not ambiguous as applied to the facts of this case. The making of a rifle having a barrel of less than sixteen inches, not otherwise exempted, is subject to the imposition of the excise tax. Thus, the holding of *Auto-Ordnance* has no application to the present case.

In reviewing this case, the court has used every tool in its arsenal of legal analysis—rules of statutory construction, examination of pertinent legislative history, review of agency interpretation of the statute, examination of relevant case law, and the application of ordinary common sense. Each of these leads inexorably to conclusion that the Contender pistol in conjunction with the Contender Carbine Kit is a firearm under the National Firearms Act.

CONCLUSION

Summary judgment is appropriate where, as here, there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. RUSCC 56(c). Here, the only dispute between TCA and the government is the interpretation of the NFA, which is a matter of law for the court to decide.

For the reasons set forth above, this court concludes that the Contender pistol possessed in conjunction with the Contender Carbine Kit is a short barrel rifle and a firearm under the National Firearms Act. Therefore, the excise tax was properly assessed, and no refund is due to the plaintiff. Accordingly, the

defendant's motion for summary judgment is granted, and the plaintiff's motion for summary judgment is denied. The Clerk will dismiss the complaint. Each party will bear its own costs.

/s/ Lawrence S. Margolis
LAWRENCE S. MARGOLIS
Judge, U.S. Claims Court

March 23, 1990

APPENDIX C

ORDER

Before RICH, Circuit Judge, MAYER, Circuit Judge, MICHEL, Circuit Judge.

A petition for rehearing having been filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, denied.

The suggestion for rehearing in banc is under consideration.

The mandate will issue on April 5, 1991.

FOR THE COURT

/s/ Francis X. Gindhart
FRANCIS X. GINDHART
Clerk

Dated: March 29, 1991

cc: STEPHEN P. HALBROOK
GARY R. ALLEN

THOMPSON CENTER ARMS Co v US, 90-5091
(CLM-652-88 T)

APPENDIX D

ORDER

A suggestion for rehearing in banc having been filed in this case, and a response thereto having been invited by the court and filed,

UPON CONSIDERATION THEREOF, it is

ORDERED that the suggestion for rehearing in banc be, and the same hereby is, declined.

FOR THE COURT

/s/ Francis X. Gindhart
FRANCIS X. GINDHART
Clerk

Dated: May 13, 1991

cc: STEPHEN P. HALBROOK
GARY R. ALLEN

THOMPSON CENTER ARMS CO v US, 90-5091
(CLM-652-88 T)

APPENDIX E

The National Firearms Act, as amended, provides in relevant part:

1. Section 5821 [26 U.S.C. 5821]:

(a) *Rate.*—There shall be levied, collected, and paid upon the making of a firearm a tax at the rate of $200 for each firearm made.

(b) *By Whom Paid*—The tax imposed by subsection (a) of this section shall be paid by the person making the firearm.

* * * * *

2. Section 5841 [26 U.S.C. 5841]:

(a) *Central Registry*—The Secretary shall maintain a central registry of all firearms in the United States * * *.

(b) *By Whom Registered*—Each manufacturer, importer and maker shall register each firearm he manufactures, imports or makes. Each firearm transferred shall be registered by the transferor.

3. Section 5845 [26 U.S.C. 5845]:

(a) *Firearm*—The term "firearm" means (1) a shotgun having a barrel or barrels of less than 18 inches in length; (2) a weapon made from a shotgun if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 18 inches in length; (3) a rifle having a barrel or barrels of less than 16 inches in length; (4) a weapon made from a rifle if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 16 inches in length; (5) any other

weapon, as defined in subsection (e); (6) a machinegun; (7) a muffler or a silencer for any firearm whether or not such firearm is included within this definition; and (8) a destructive device. The term "firearm" shall not include an antique firearm or any device (other than a machinegun or destructive device) which, although designed as a weapon, the Secretary finds by reason of the date of its manufacture, value, design, and other characteristics is primarily a collector's item and is not likely to be used as a weapon.

* * * * *

(c) *Rifle*—The term "rifle" means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed cartridge to fire only a single projectile through a rifled bore for each single pull of the trigger, and shall include any such weapon which may be readily restored to fire a fixed cartridge.

(i) *Make*—The term "make", and the various derivatives of such word, shall include manufacturing (other than by one qualified to engage in such business under this chapter), putting together, altering, any combination of these, or otherwise producing a firearm.

4. Section 5861 [26 U.S.C. 5861]:

It shall be unlawful for any person—

(c) to receive or possess a firearm made in violation of the provisions of this chaper; or

(d) to receive or possess a firearm which is not registered to him * * * ; or

(e) to transfer a firearm in violation of the provisions of this chapter; or

(f) to make a firearm in violation of the provisions of this chapter;

* * * * *

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